Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	WC Docket No. 07-245
Amendment of the Commission's Rules	)	
and Policies Governing Pole Attachments	)	RM-11293
	)	
	)	RM-11303

COMMENTS OF THE UTILITIES TELECOM COUNCIL

Jill M. Lyon, Vice President & General Counsel
Brett Kilbourne, Director of Regulatory Service & Associate Counsel

1901 Pennsylvania Avenue, NW
Fifth Floor
Washington, DC 20006
202-872-0030

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SUMMARY

UTC supports the concept of a single rate for broadband attachments, but opposes the range of rates that the Commission has proposed. The Commission should not set the rate below the telecommunications rate; moreover the Commission should modify its implementation of the telecommunications rate to ensure full cost recovery for pole attachments. Finally, the Commission should not only apply the rate to broadband attachments, but it should apply it more broadly to attachments that provide ancillary services.

UTC agrees with the FCC that convergence has blurred the distinction between CATV and telecommunications, which has raised practical issues with regard to the application of the CATV and telecommunications rates to different attachments on the pole. These practical issues are compounded by the FCC's pole attachment rules, which prevent utilities from determining for themselves the services that are provided over various attachments on the pole. As a result, the telecom rate is more myth than reality, and it is likely to continue as carriers and CATV companies offer both IP-telephony and video services in the future. Moreover, the rate formulae for both CATV and telecommunications attachments fail to capture the actual costs of pole attachments. Therefore, it is appropriate for the Commission to develop a single broadband rate that provides full cost recovery for pole attachments.

UTC also opposes strongly expanding pole attachment regulation to apply to ILECs, which clearly are excluded from eligibility for pole attachment rates or access under the Pole Attachment Act. ILEC exclusion is a matter of not only the plain text, but the context of the statute as a whole and its legislative history. In addition, the

public interest would not be served if ILECs were entitled to regulated rates, because it would frustrate Congress's intent in promoting competition among CLECs and CATV providers. Extending regulated pole attachments to ILECs would provide a subsidy that Congress chose to withhold. It would also run contrary to the public interest by undermining critical infrastructure and mutually negotiated joint use agreements that have been in place for decades.

UTC supports the Commission's initiatives to protect critical infrastructure against unauthorized attachments and code violations. In order to discourage these practices, the Commission should uphold the terms of pole attachment agreements and defer to utility engineering and safety standards – those of the industry that must work in this hazardous environment, and knows it best -- for pole attachments. Unfortunately, the FCC's jurisprudence in pole attachment complaint proceedings has done the opposite. Attachers are not held accountable for unauthorized attachments, and they are forgiven for attachments that are in violation of utility standards. As the Commission considers these issues in the broader context of pole attachment access in general, UTC urges it to refrain from requiring certain practices as a rule. Instead the FCC should continue to use guidelines and review pole attachment practices on a case by case basis. This will ensure that access is provided on a non-discriminatory basis, and it will protect critical infrastructure to the extent that the FCC enforces the terms and conditions of pole attachment agreements against attachers that disregard them.

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COMMENTS OF THE UTILITIES TELECOM COUNCIL

The Utilities Telecom Council ("UTC") hereby files its comments in response to the Notice of Proposed Rule Making in the above-referenced proceeding.[1] UTC supports the Commission's initiative to consider comprehensively its pole attachment regulations. These regulations have long subsidized the communications industry at the expense of electric utilities and their customers. As a practical matter, they have also stripped utilities of control over their own infrastructure, contrary to the Pole Attachment Act.[2] Moreover, unauthorized and uncontrolled attachments threaten the safety and reliability of the electric infrastructure, at a time when utilities are under increasing State and federal requirements to upgrade their networks and make

[1] UTC fully supports the *Comments of the Edison Electric Institute and UTC* in this proceeding, and UTC's individual comments are intended to supplement the arguments therein.

[2] *See* 47 U.S.C. §224(f)(2)("a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.")

infrastructure more "intelligent," reliable and secure.[3] Thus, UTC urges the Commission to establish pole attachment policies that both promote and protect critical infrastructure, while promoting the larger goals of the Act.

I. Introduction

UTC is pleased to offer its comments in this proceeding. UTC is the international trade association for the telecommunications and information technology interests of electric, gas and water utilities and other critical infrastructure industries. Its members include large investor-owned utilities that serve millions of customers, as well as relatively small municipal and cooperatively organized utilities that may serve only a few thousand customers. All of its members have one thing in common: they own, operate or manage communications systems that support the safe and effective delivery of essential services to the public at large.

Many of its utility members are subject to FCC or state pole attachment regulation, and UTC has participated in every pole attachment rulemaking at the FCC, as well as various state pole attachment proceedings. Moreover, pole attachments affect critical infrastructure, and UTC has advocated for rates and access rules that support critical infrastructure. As such, the members of UTC have a direct interest in

[3] *See e.g.* Energy Independence and Security Act of 2007, PL 110-140, December 19, 2007, 121 Stat 1492 (promoting smart grid technologies to increase energy efficiency and reliability.) *See also Mandatory Reliability Standards for Critical Infrastructure Protection*, FERC Docket No. RM06-22-000; Order No. 706, 73 FR 7368-01 (Feb. 7, 2008)(approving eight Critical Infrastructure Protection (CIP) Reliability Standards submitted to the Commission for approval by the North American Electric Reliability Corporation (NERC)); *and see* Rule 25-6.0342, F.A.C (requiring investor-owned electric utilities in Florida to file a Storm Hardening Plan with the Florida Public Service Commission on or before May 7, 2007 and every three years thereafter as a matter of course.)

the instant rulemaking and UTC is pleased to offer its comments in support of the FCC's initiative to reexamine its pole attachment rules.

II. State of Pole Attachments: Current Status and Trends

In the *NPRM*, the Commission asks a variety of questions regarding the state of pole attachments. Specifically, it seeks comment about the nature and scope of pole attachments by the various providers, including data on pricing and the number of poles and conduit that different providers use for pole attachments. It also seeks comment on how pole attachment price and usage affects the larger goals of the Act, including the expansion of broadband Internet access service and competition between cable and telecommunications service providers. Finally, it inquires how States that regulate pole attachments handle issues that arise concerning rates and access.[4]

UTC surveyed its members and provides the following data on the state of pole attachments.[5] In summary and as discussed in further detail below, the survey data indicates that joint use and joint ownership with ILECs has changed over time, and that utilities and ILECs have mutually negotiated new agreements that reflect these changes. Meanwhile, demand for regulated pole attachments continues to increase, and the vast majority of attachments are cable television attachments.[6] The disparity between the number of CATV and CLEC attachments indicates the degree to which the

[4] Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, Notice of Proposed Rule Making, WC Docket No. 07-245, 22 FCC Rcd. 20195, 20200 at ¶13 (2007)("*NPRM*").

[5] UTC Pole Attachment Survey Report, – attached hereto as Appendix.

[6] *Id*. at 4, 10 (utilities report on average that the number of pole attachment applications increased 40%, and some utilities reported that they experienced a 200% increase in the number of applications during the last 12 months).

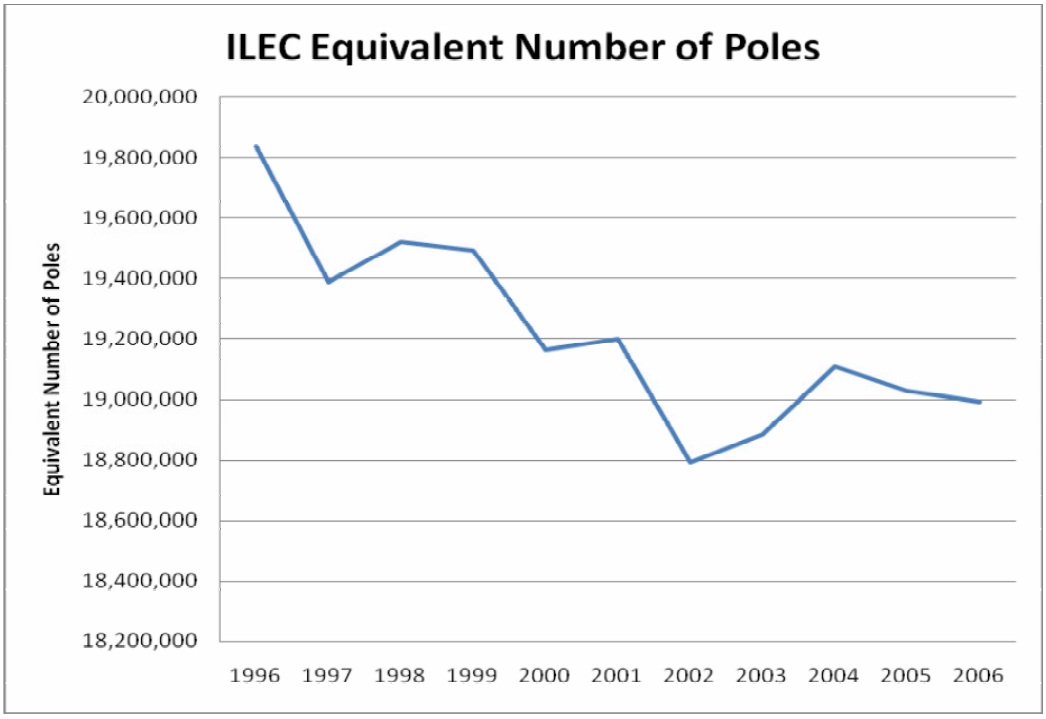
cable rate subsidizes the cable industry and distorts competition between telecommunications and cable service providers. Meanwhile, utilities have no way of knowing how many attachments are used to provide broadband services, because the Commission has refused to require attachers to certify the type of services they are offering on their attachments. Finally, some States have developed their own pole attachment regulations for rates and access, including regulations to discourage unauthorized attachments.

A. Joint use and joint ownership has changed over time and agreements are being mutually negotiated by utilities and ILECs.

Long before there was pole attachment regulation, there was joint use and joint ownership between electric utilities and telephone companies. In joint use, ILECs and utilities each own their poles and allow each other to attach to them; whereas in joint ownership the ILEC and the utility own poles jointly. The fundamental purpose of joint use and joint ownership was to avoid the duplication of redundant facilities for reasons of both economic efficiency and aesthetics. Joint use and joint ownership continues today for the same reasons, and in some cases, using the same agreements that have been in place for decades.

However, the relationship between ILECs and utilities has changed over time. ILECs have gone from rate of return regulation, which encourages infrastructure investment, to price cap regulation, which encourages efficiency. They have also been subject to increased competition from CLECs, CATV and other service providers. During that time, the percentage of pole ownership has shifted, with electric utilities owning a greater share of joint use poles. Whereas in 1978, Congress estimated that

utilities owned 53% of the poles,[7] today utilities are reporting that they own 70% of the joint use poles.[8] And the FCC's ARMIS reports show that the number of ILEC equivalent poles has declined since 1996, as shown in the table below. As such, the data strongly suggests that ILECs have been cutting back on their investment in poles.



Joint use agreements control the rates, terms and conditions by which utilities and ILECs share the costs of pole attachments. The joint use contracts contain percentage of ownership clauses, which form the basis for cost sharing. As utilities have increased their share of the poles over time, they bear more of the upfront costs, which require reimbursement from ILECs. As these joint use agreements can be very old, the actual percentage of pole ownership may be far different from the percentage of ownership at the time the agreement was written. Hence, when these agreements are

[7] S. Rep. 95-580, P.L. 95-234, Communications Act Amendments of 1978, Nov. 2, 1977.

[8] UTC Pole Attachment Survey Report, Appendix at 4, 7.

renegotiated, the change in pole ownership over time may substantially affect the balance of costs and hence reimbursement.

In addition to pole ownership costs, utilities are bearing more of the pole maintenance costs. Utilities report that many ILECs do not set poles, and they rely on utilities to set poles for them. Moreover, in the aftermath of hurricanes, ice storms and other natural disasters, utilities are first on the scene to restore power and they incur those pole repair costs. Again, these pole inspection, make ready and pole change-out costs must be reimbursed under joint use and joint ownership agreements.

These joint use and joint ownership agreements are mutually negotiated, and ILECs are sophisticated and skilled negotiators with annual revenues that dwarf those of their utility counterparts. Moreover, utilities have not leveraged their increased pole ownership against ILECs, as USTA contends.[9] Utilities and ILECs mutually depend on access to each other's poles; and so there is no bargaining advantage to leverage. In fact, utilities reported that any increase in charges for ILEC attachments to utility poles have been matched by charges from ILECs for electric utility attachments to ILEC poles.[10] As such, although the relationship between ILECs and utilities has changed over time, these cost recovery issues can be resolved through the terms and conditions of mutually negotiated joint use and joint ownership agreements.

[9] Petition for Rulemaking of the United States Telecom Association in RM-11293 at 12 (filed Oct. 11, 2005)("USTA Petition").

[10] Comments of the United Telecom Council and the Edison Electric Institute in RM-11293 at 14 (filed Dec. 2, 2005).

B. Regulated rates for CATV and CLEC attachments distort markets.

In 1978, Congress gave the FCC limited jurisdiction to regulate the rates of CATV attachments. The purpose of the 1978 Pole Attachment Act was to protect the infant CATV industry, which had "no practical alternative except to utilize available space on existing poles," that were owned by telephone and electric utilities.[11] And Congress would in fact later acknowledge that "[t]he beneficial rate to cable companies was established to spur the growth of the cable industry, which in 1978 was in its infancy."[12]

From those humble beginnings, the CATV industry has grown enormously, and so have its pole attachments. Today, utilities are reporting that there are almost nine times more CATV attachments on their poles than CLEC attachments.[13] The cable industry has thrived on pole attachments and it has enjoyed the most favorable regulated rate. Although the penetration rates for cable have been a topic of some debate recently, even by the cable industry's conservative estimates the CATV penetration rate is 53-68% and CATV systems pass nearly all homes in the country.[14] In addition, cable systems have expanded their service offerings to include cable modem and IP telephony. NCTA reports that cable systems provide high-speed

[11] Cable television only owned 10,000 poles and attached to 10 million poles owned by telephone and electric utilities at that time.

[12] H.R. Rpt. No. 104-204 (July 24, 1995).

[13] UTC Pole Attachment Survey Report, Appendix A at 8.

[14] *See* Letter from Daniel Brenner, Senior Vice President for Law and Regulatory Policy for the National Cable & Telecommunications Association (NCTA), to Marlene H. Dortch, Secretary, FCC, MB Docket No. 06-189 (filed Nov. 20, 2007).

Internet to 34.7 million of the 117.1 million homes passed by the service, and that CATV systems provide residential cable telephony to 13.7 million of them.[15]

As the cable industry is no longer an infant industry and is offering ancillary services in addition to traditional video, it is appropriate for the Commission to question whether cable systems should continue to receive the cable rate. The cable industry now serves 58% of all homes with a television, and it controls over 68% of the MVPD market.[16] The cable rate distorts markets by providing a competitive advantage against telephone companies that offer video services yet pay the telecommunications rate. Moreover, cable companies are offering IP telephony services in conjunction with high-speed Internet to compete with telecommunications companies. Therefore, the Commission is right to be calling into question the cable rate for pole attachments, as will be discussed more fully below.

Conversely, the telecommunications rate may distort the telecommunications market, discouraging service providers from offering – or disclosing to utilities their offering of – telecommunications services. The numbers bear this out. Utilities reported that only 11% of regulated attachments to poles were subject to the telecommunications rate, compared to 89% that were subject to the cable rate. Meanwhile, the reverse was true for attachments in conduit, where utilities reported 92% of all attachments were

[15] *See* Industry Statistics at http://www.ncta.com/Statistic/Statistic/Statistics.aspx

[16] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, MB Docket No 05-255, 21 F.C.C.R. 2503 at ¶7 (2006).

CLEC attachments and only 8% were CATV attachments.[17] Note that there is no difference in the rates for cable and telecommunications in conduit, because the FCC eliminated the unusable space factor for conduit.[18] Thus in conduit, where the rate is the same for telecommunications and cable attachments, there are more reported telecommunications attachments than cable attachments; but on poles where there is a difference in the rates, attachments reported as cable far outnumber those reported as telecommunications. While there are other plausible reasons for the disparity between the percentage of CLEC attachments on poles and conduit, the numbers do indicate that providers are attempting to avoid the higher telecommunications rate on poles. In any event, the telecommunications rate has become more myth than reality, because relatively few attachments are subject to the telecommunications rate.

In the *NPRM*, the Commission asks how many poles in a typical metropolitan area have three attachments or fewer, and how many support so many users that they are approaching full capacity.[19] On average, utilities reported that almost 70% of their poles in metropolitan areas have three or fewer attachments.[20] Thus, the actual number of attaching entities is at odds with the FCC's presumptions for the average number of

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[17] Note that most utilities reported that they had relatively few if any conduit attachments.

[18] *Implementation of Section 703(e) of the Telecommunications Act of 1996*, Report and Order, CS Docket No. 97-151, 13 FCC Rcd. 6777 at ¶¶ 107-111 (1998)("*Telecom Order*").

[19] *NPRM* at ¶13.

[20] Note that the average number of attaching entities may vary significantly between metropolitan areas. As an average though, utilities reported that 70% of poles had fewer than three attachments.

attaching entities in urban areas.[21] Applying these numbers using the FCC's telecommunications rate formula, utilities should recover 16.9% of their pole costs.[22] Instead, because the FCC presumes there are five attaching entities in urbanized areas, utilities recover only 11.11 % of their pole costs from telecommunications attachments in metropolitan areas. As such, the telecommunications rate subsidizes CLECs, and the FCC should revise its implementation of the rate to remove this subsidy, as more fully described below.

C. Commission's rules prevent utilities from knowing which attachments are used to offer broadband service; state regulation of pole attachments addresses various rate and access issues involving various entities.

In the *NPRM*, the FCC seeks "information regarding how many pole attachments are used to offer, among other services, broadband Internet access service, and conversely, how many pole attachments are not used to offer such services."[23] Unfortunately, utilities are not in a position to answer this question. The FCC won't let them verify what services that attachers are actually offering, and conversely it won't require attachers to certify whether they are offering telecommunications services or cable services over their attachments.[24] UTC urges the FCC to eliminate this inequality,

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[21] *See In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, CS Docket No. 97-98, 16 FCC Rcd. 12103, 12139 at ¶¶71-72 (2001) ("Reconsideration Order")(presuming that there are five attaching entities on average in urbanized areas).

[22] Calculation based upon three attaching entities on a 37.5 foot pole. Note that this calculation assumes that the number of attaching entities includes electric utilities, per the FCC's current presumptions.

[23] *NPRM* at ¶13.

[24] *Telecom Order,* 13 FCC Rcd. 6777 at ¶35 (refusing to impose a certification requirement on cable operators that they are not offering telecommunications service).

and require attachers to certify what kind of services they are offering over their attachments. This is particularly important if the FCC actually establishes a broadband rate, because attachers may fail to notify utilities when they begin to offer such services. This would help to avoid ambiguity that could lead to disputes over the nature of the services that are offered over attachments.

In the *NPRM*, the FCC also seeks comment on how States have handled issues with regard to rates and access; and how they regulate joint use and joint ownership.[25] States are taking an increasing interest in pole attachments. For years, 18 States and the District of Columbia regulated pole attachments. This past year, Arkansas and New Hampshire passed legislation to authorize their state PUC's to regulate pole attachments, as well.[26] In fact, the New Hampshire PUC has certified to the Commission that it has established interim rules for pole attachment regulation.[27] In addition, pole attachment legislation is pending in Georgia, Alabama and Washington.[28] States that regulate pole attachments tend to adopt the FCC's rates, although there are

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See also 47 C.F.R § 1.1403(e) (relying on cable operators to voluntarily notify pole owners upon offering telecommunications service).

[25] *NPRM* at ¶13.

[26] *See* 2007 Arkansas Laws Act 740 (H.B. 1636), as codified at A.C.A. § 23-4-1002, eff. July 31, 2007. *See also* 2007 N.H. Laws Ch 340 (S.B. 123), as codified at N.H. Rev. Stat. Ann. 374:34-a.

[27] *See* Letter from Thomas B. Getz, Chairman of the New Hampshire Public Utilities Commission, to Marlene H. Dortch, Secretary, FCC in WC Docket No. 07-245 (filed Jan. 31, 2008) (certifying pursuant to section 224(c) and 47 C.F.R § 1.1414 that the New Hampshire PUC regulates utility pole attachments).

[28] *See* 2007 Georgia Senate Bill No. 105, Georgia One Hundred Forty-Ninth General Assembly-2007-2008 Regular Session; *and see* 2007 Washington House Bill No. 2533, Washington Sixtieth Legislature - 2008 Regular Session.

several (e.g. California, Oregon, and Ohio) that only have one rate for pole attachments. States tend to diverge from the FCC regarding access requirements. Oregon, for example, enforces statutory penalties against unauthorized attachments and non-compliant attachments.[29] Meanwhile, Arkansas has expanded pole attachments to include attachments by utilities and ILECs, as well as a variety of other service providers in addition to cable and telecommunications carriers.[30] Finally, States may review disputes involving joint use arrangements under their general authority over regulated utilities. As such, cable television operators, telecommunications carriers and ILECs have recourse at the state level on matters involving the rates, terms and conditions for pole attachments.

III. Statutory Framework: Authority to Establish Rates for Broadband Attachments and ILEC Attachments

In the *NPRM*, the Commission generally asks for comment regarding its statutory authority to establish a single unified rate "paid by both cable systems and telecommunications carriers when their pole attachments are used to provide

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[29] *See* O.R.S. 757.290, note 1. *See also* OAR 860-028-0130 through OAR 860-028-0150 (providing for a sanction of up to $500 or 60 times the annual rental rate per pole, whichever is higher, against a pole occupant that has no contract with the pole owner; providing for a sanction of up to $250 or 30 times the annual rental rate per pole, whichever is higher, on pole occupants that make attachments without a permit from the pole owner; and providing for sanctions up to $200 or 20 times the annual rental rate per pole, whichever is higher, on pole occupants that install attachments in violation of their contract or permit agreements, or in violation of the PUC's safety rules. Note that these penalties are subject to reductions, if the attacher timely complies with a request from the pole owner to cure the problem with the pole attachment.)

[30] *See* A.C.A. § 23-4-1001 (defining a pole attachment to mean the attachment of wires and related equipment to a pole, duct, or conduit owned or controlled by a public utility for the provision of:(i) Electric service; (ii) Telecommunication service; (iii) Cable television service; (iv) Internet access service; or (v) Other related information services.)

broadband Internet access service."[31] In that context, it asks for comment on "the extent to which the current cable rate formula, whose space factor does not include unusable space, results in a subsidized rate, and, if so, whether cable operators should continue to receive such subsidized pole attachment rate at the expense of electric consumers;" and "whether cable operators should continue to qualify for the cable rate where they offer multiple services in addition to cable service."[32] Similarly, the Commission also asks "whether all telecommunications carriers must pay the telecom rate, regardless of what other services they may provide over their attachments."[33] Finally, the Commission asks whether its general authority to regulate pole attachments pursuant to section 224(b) extends to ILECs.[34]

A. The Commission has the authority to establish a single broadband rate for pole attachments.

The FCC has the authority to establish a single rate for pole attachments that are used to provide broadband services. As the Supreme Court held, the FCC's rate making authority is not coextensive with the rate provisions of Sections 224(d) and (e). It also has general authority under Section 224(b) to set just and reasonable rates for pole attachments.[35] As such, the FCC may establish a single just and reasonable rate

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[31] *NPRM* at ¶21.

[32] *NPRM* at ¶19.

[33] *NPRM* at ¶20.

[34] *Id*.

[35] *National Cable & Telecomm's Ass'n v. Gulf Power Co*., 537 U.S. 327, 326 (2006)(hereinafter "*Gulf Power")(*"The sum of the transactions addressed by the rate

for broadband attachments and that rate should be the telecommunications rate, as explained below.

However, the Commission may only apply a broadband rate to pole attachments that are subject to its jurisdiction. Section 224(a)(4) defines pole attachments to include "any attachment by a cable television operator or a provider of telecommunications service."[36] Therefore, the Commission may only apply a broadband rate to pole attachments by cable television operators or telecommunications service providers.

A broadband attachment by a cable television operator should not be entitled to the cable rate. Section 224(d) provides that the cable television rate shall apply to attachments that are used *solely* to provide cable service.[37] If a cable television operator is offering broadband Internet access service in addition to cable service, it is not offering solely cable service over its attachments. The FCC is therefore free to establish a just and reasonable rate for broadband attachments by cable television operators. Although the FCC has applied the cable rate to attachments used to provide commingled cable and Internet, it is free to reconsider this decision.[38]

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formulas- § 224(d)(3) (1994 ed., Supp. V) (attachments 'used by a cable television system solely to provide cable service') and § 224(e)(1) (attachments 'used by telecommunications carriers to provide telecommunications services')-is less than the theoretical coverage of the Act as a whole. Section 224(a)(4) reaches 'any attachment by a cable television system or provider of telecommunications service.' The first two subsections are simply subsets of-but not limitations upon-the third.")

[36] 47 U.S.C. §224(a)(4).

[37] 47 U.S.C. §224(d).

[38] *Gulf Power,* 534 U.S. at 339 (2002)("Of course, the FCC has power to reconsider prior decisions. . . If the FCC should reverse its decision that Internet services are not telecommunications, only its choice of rate, and not its assertion of jurisdiction, would be implicated by the reversal.")

Section 224(e) provides that the telecom rate shall apply to attachments by telecommunications carriers and cable operators providing telecommunications services.[39] As such, broadband attachments by telecommunications carriers and cable telephony providers must also be subject to the telecommunications rate by virtue of the underlying use of the attachment for telecommunications services. Anything less than the telecommunications rate would frustrate Congress's intent in Section 224(e) to establish a rate, which recognizes that the unusable space benefits "all entities attaching to the pole" and that apportions the cost of the unusable space among all such attachments.[40]

Nonetheless, Time Warner Telecom mistakenly argues that the cable rate should apply to attachments by telecommunications carriers offering video services.[41] Time Warner Telecom claims that the telecommunications rate is discriminatory because it puts telecommunications carriers at a competitive disadvantage with cable service providers, despite the fact that they offer similar services. Further, it argues that the non-discrimination mandate of Section 224(e)(1) should trump Section 224(e)(2)-(3), and that the FCC should apply the cable rate to telecommunications attachments used to provide video services.

The first problem with this argument is that it focuses on Section 224(e)(1) to the exclusion of the rest of subsection (e). Subsection (e) directs the Commission to

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[39] 47 U.S.C. §224(e)

[40] *See* H.R. Rep. No. 104-204(I), 104th Cong., 1st Sess. 1995, at 24.

[41] *See* Letter from Thomas Jones, Counsel for Time Warner Telecom, Inc. (TWTC), to Marlene H. Dortch, Secretary, FCC, RM-11293, RM-11303, Attach. at 11-12 (filed Jan. 16, 2007) ("TWTC White Paper").

establish a rate "in accordance with this subsection" for pole attachments used by "telecommunications carriers to provide telecommunications services." This also applies to cable operators that provide telecommunications services, as well as telecommunications carriers. In addition, Sections (e)(2) and (e)(3) delineate the cost recovery guidelines for the usable and unusable space by telecommunications attachments. TWTC's interpretation ignores these provisions.

Moreover, applying the cable rate to attachments by telecommunications carriers that provide video services would conflict with Section 224(d), which limits the cable rate to attachments used solely to provide cable services. Although the Commission has applied the cable rate to attachments used to provide commingled cable and Internet services, it would not be reasonable to apply the cable rate to attachments used to provide commingled telecommunications and Internet services. The Commission has consistently recognized that the cable rate does not apply if an attachment is used to provide telecommunications. Instead, the telecommunications rate applies.

If the Commission wishes to stabilize rates for similar services, it should adjust the cable rate up to the telecommunications rate,[42] As described further below, the cable rate is an inherent subsidy that distorts markets and shortchanges utilities. Moreover, convergence is blurring distinctions between service providers, making separate rates for cable and telecommunications attachments inappropriate and difficult to apply as a practical matter. This proceeding represents a momentous opportunity for the Commission to end the system of subsidies and to promote parity between similar

[42] *See, NPRM* at ¶31.

services in an era of convergence. Thus, the Commission should set the broadband attachment rate based upon the telecommunications rate instead of the cable rate.

B. The Commission lacks jurisdiction to regulate ILEC rates

The Commission does not have jurisdiction to regulate the rates of ILEC attachments. Section 224(a)(5) excludes ILECs as telecommunications carriers for purposes of Section 224.[43] This blanket exclusion is unaltered by the use of the term "provider of telecommunications services" in Section 224(a)(4).[44] That term was used instead of "telecommunication carrier" in order to cover attachments by cable television operators that chose to also provide telecommunications services.[45] It was not intended to include ILECs, nor may it be exploited by USTA to effectively nullify Section 224(a)(5). If Congress had meant to regulate ILEC rates, it would not have used the

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[43] 47 U.S.C. §224(a)(5)(stating that "[f]or purposes of this section, the term "telecommunications carrier" (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.").

[44] 47 U.S.C. §224(a)(4) ("The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.")

[45] See H.R. Conf. Rep. 104-458 (explaining that the Senate version that was ultimately adopted in conference requires that poles, ducts, conduit, and rights-of-way that are owned or controlled by utilities are made available to cable television systems at rates, terms and conditions that are just and reasonable, regardless of whether the cable system is providing cable television or telecommunications services." (*emphasis added*)). This is a clear contradiction of USTA's claim that the legislative history supports its view that Congress intended to provide regulated rates for ILEC attachments when it sought to provide access for all providers of telecommunications services. USTA cannot cite any specific reference to ILECs that would indicate that Congress wanted to provide them with regulated rates, terms and conditions for pole attachments. *Compare* USTA Petition at 8.

term "telecommunications carrier" in Section 224(e).[46] Thus, Section 224(e) must be read in combination with Section 224(a)(5) to exclude ILECs from regulated rates for telecommunications attachments.

Section 224(b) provides general authority to regulate just and reasonable rates for pole attachments. Although the Supreme Court held that the FCC may rely on Section 224(b) to apply the cable rate to commingled cable and Internet attachments, this precedent cannot serve to support regulated rates for ILEC attachments. In that case, the Court owed deference to the FCC's interpretation with regard to commingled cable and Internet attachments because the interpretation didn't conflict with other provisions in the statute and the FCC was filling a gap in the statute.[47] Here, there is no gap to fill, while regulating ILEC rates would conflict with section 224(a)(5).[48] Hence, no deference would be owed towards such an interpretation. Therefore, Section 224(b) cannot be read in isolation to provide jurisdiction over ILEC attachments.

The Commission itself has interpreted Section 224(a)(5) to exclude ILECs from rates, as well as access. The Commission concluded that "[b]ecause, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must

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[46] 47 U.S.C. §224(e)(mandating that "[t]he Commission shall . . ., prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services.")

[47] *Gulf Power*¸ 534 U.S. at 339, *citing Chevron U.S.A. Inc. v. Natural Resources Defense Council*, *Inc*., 467 U.S. 837, 843-844 (1984) (stating that "the subject matter here is technical, complex, and dynamic; and as a general rule, agencies have authority to fill gaps where the statutes are silent").

[48] *Compare Gulf Power,* 534 U.S. at 335-336. (stating that "[i]t is true that specific statutory language should control more general language when there is a conflict between the two. Here [i.e. commingled Internet and cable attachments], however, there is no conflict. The specific controls but only within its self-described scope.")

grant other telecommunications carriers and cable television systems access to its poles, even though the ILEC has *no rights* under Section 224 with respect to the poles of other utilities."[49] The right of access is not severable from the right to regulated rates.[50] Nor can the use of the term "provider of telecommunications service" in section 224(a)(4) be distinguished from the term "telecommunications carrier" in sections 224(e) and (f) to create a severable right to regulated rates. The term "telecommunications carrier" is defined as "any provider of telecommunications service," and thus the two terms are virtually interchangeable.[51]

The Commission should not reverse its established policy of excluding ILECs from regulated rates and access for pole attachments. "An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[52] The Commission's established policy to exclude ILECs from rates and access for pole attachments is consistent with the text of the statute and its legislative history. To

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[49] *See*, *e.g., Local Competition Order*, 11 FCC Rcd at 16059 at ¶1119; *Telecom Order*, 13 FCC Rcd at 6781 at ¶5, *emphasis added*. *See also* 47 U.S.C. §224(a)(1)(defining a utility as any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications). *And see* 47 U.S.C. §224(a)(5)(excluding ILECs as telecommunications carriers for purposes of section 224).

[50] 47 U.S.C. §224(b). This provision provides general authority without distinction between rates and access.

[51] 47 U.S.C. §153(44).

[52] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 103 S.Ct. 2856.

reverse course from that established policy now after ten years would be arbitrary and capricious.

IV. Rate Level: Removing Subsidies & Promoting Broadband Access & Competition

UTC supports the Commission's tentative conclusion that it should establish a single rate for broadband attachments. In establishing a single rate, the Commission should use a revised version of the telecommunications rate in order to remove subsidies from the existing telecommunications rate. The Commission should not use the cable rate, which does not recover the costs of the unusable space. By removing subsidies and establishing a single broadband rate, the Commission will achieve its goals of promoting broadband access and competition while providing a rate that fairly compensates utilities for their pole attachment costs.

A. The cable rate subsidizes attachers at the expense of electric customers; and the Commission should impose a higher rate, particularly when cable attachments do not offer solely cable service.

The FCC seeks comment on "the extent to which the current cable rate formula, whose space factor does not include unusable space, results in a subsidized rate, and, if so, whether cable operators should continue to receive such subsidized pole attachment rate at the expense of electric consumers." Moreover, it seeks comment on "whether cable operators should continue to qualify for the cable rate where they offer multiple services in addition to cable service."[53]

The cable rate inherently subsidizes the cable industry by failing to include the unusable space costs. Instead, it only recovers the percentage of the overall pole costs equivalent to the one foot of space that it occupies on the pole. That amounts to only

[53] *NPRM* at ¶19.

7.4% of the overall pole costs. The actual avoided costs are substantial. The unusable space costs represent the majority of the overall pole costs. Moreover, these avoided costs really add up when aggregated overall, because the overwhelming majority of pole attachments are attachments by CATV operators.

Clearly, cable operators benefit from the unusable space on the pole and should pay their share of those costs. But for the unusable space, there could be no usable space on the pole for CATV attachments. In addition, CATV operators should contribute to the costs of unusable space to provide investment in critical infrastructure that ensures reliability for the common good of utilities, attachers and the public at large. As such, the Commission should require CATV operators to pay for their share of the unusable space costs, as well as their share of the costs of the usable space on the pole.

This is particularly appropriate when cable operators offer additional services such as broadband. The cable rate is only supposed to apply to attachments used solely to provide cable television service.[54] When the attachment is used to provide other services, the cable rate no longer applies. In 1998, the Commission decided to apply the cable rate to attachments used to provide commingled cable and Internet services in order to promote access and competition to rural and underserved areas, although the vast majority of such services were provided in competitive markets.[55] Circumstances have changed. Broadband is now available to most of the country and cable is competing with telecommunications carriers to provide broadband in many of those

[54] *See* 47 U.S.C. §224(d)(3)("[t]his subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service.")

[55] *Telecom Order*, 13 FCC Rcd at ¶30.

areas. As such, the cable subsidy is unnecessary and it competitively disadvantages telecommunications carriers that must pay the telecommunications attachment rate.

B. The Commission's implementation of the telecommunications rate also contains subsidies that should be eliminated.

The telecommunications attachment rate also contains subsidies. Unlike the cable rate, however, the telecommunications rate is not an inherent subsidy; instead, subsidies of the telecommunications industry are due to the FCC's implementation of the rate. To eliminate such hidden payments by electric customers, UTC urges the Commission to make slight modifications to the presumptions and general rules relied upon in calculating pole attachment rates under the telecommunications formula. Specifically, the Commission should

(1) reduce its presumptions for the average number of attaching entities in rural and urban areas to reflect actual prevailing conditions;

(2) only count attaching entities that provide "pole attachments" as defined in Section 224(a)(4); and

(3) allocate the communications worker safety zone space to communications attachers, not to the utility.

These modifications do not require any change to the statutory rate, and therefore, the Commission has the authority to remedy certain inequities in the telecommunications formula that currently subsidize attaching entities.

1. The Commission should reduce its presumptions for the average number of attaching entities.

As noted above, one of the main subsidies in the telecommunications rate is the Commission's presumption for the number of attaching entities. The Commission presumes that there are five attaching entities in urban areas and three attaching entities in rural areas.[56] In applying these presumptions, "[i]f any part of the utility's service area within the state has a designation of urbanized…then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities."[57]

In contrast to the FCC's presumptions, utilities report that the overwhelming majority of poles in metro areas have three or fewer attachments, not five.[58] As such, UTC suggests that the Commission revise its presumptions so that there are three attaching entities in urban areas. In addition, UTC suggests that the Commission retain its presumption of three attaching entities in rural areas. As a practical matter, that would provide a uniform presumption for the number of attaching entities in both rural and urban areas.

Such a uniform presumption would help to eliminate potential disputes regarding whether the rural or urban presumption should apply to attachments in a given area. It would eliminate administrative difficulties associated with calculating separate rates for

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[56] The FCC presumes that in urban areas there will be attachments by electric, telephone, cable, and competitive telecommunications service providers, and governmental agencies on each pole. *Reconsideration Order* at ¶¶71-72.

[57] 47 C.F.R. § 1.1417(c).

[58] *Supra* Section II. B at 8. *See also* UTC Pole Attachment Survey Report, Appendix A at 5, 18-19.

attachments in rural and urban areas. Moreover, it would promote broadband access and competition in rural areas, because the current presumptions result in a higher rate for telecommunications attachments in rural areas. Finally, it would eliminate the need for section 1.1417 of the Commission rules, which presumes that a single urbanized area in a state should cause the whole service territory in that state to be designated as urban. UTC strongly opposes this presumption, which is arbitrary and has the practical effect of inflating the average number of attaching entities in a given area.

The Commission's presumptions clearly overestimate the number of competitive telecommunications attachments. CLEC attachments are overestimated based on the assumption that there is at least one CLEC attachment on every pole in an urban area. Actually, CLEC attachments probably account for less than 10% of all attachments, on average.[59] Even assuming that cable and ILEC attachments are on every pole in an urban area, which is a dubious presumption in itself, there is no way that CLEC attachments are on any more than a small fraction of every joint use pole. In any event, the Commission's presumptions are too high and should be reduced to three attaching entities in urban and rural areas.

[59] This is estimated based on UTC survey data and on the FCC's ARMIS data. The UTC survey data indicates that cable attachments outnumber CLEC attachments 9-1. Add to that the number of ILEC attachments, and the percentage of CLEC attachments drops substantially further. This is supported by the FCC's ARMIS data. *See Trends in Telephone* Service, Report by Industry Analysis and Technology Division, Wireline Competition Bureau at Table 8.3 (Feb. 2007)(reporting that there were 10,687,000 CLEC-owned lines and 142,249,668 ILEC lines as of June 2006). Note that the ARMIS data also indicates that the number of CLEC-owned lines has only slightly increased since 1999 from 2,723,000 to 10,687,000 lines.

2. The Commission should not count attaching entities unless they attach pole attachments, as defined by section 224(a)(4).

The Commission should not count attaching entities unless they attach pole attachments, as defined by Section 224(a)(4). First and foremost, this would provide the potential for full cost recovery by allocating the unusable space costs only among attachers (i.e. cable television operators and CLECs) that might actually share in those costs. Second, it would reasonably limit the scope of the term "attaching entities" based on the jurisdictional bounds of Section 224(a)(4), instead of expanding the term without any basis in the text of the statute or the legislative history, as is currently the case. Third, it would be consistent with the rest of the statute: when Congress chose to refer to utilities, ILECs or others, it did so expressly.

First, the unusable space costs could be fully recovered by counting only cable television operators and CLECs. It would allocate the unusable space costs among CLECs who do currently share in the costs of the unusable space, and it would allocate the unusable space costs among cable television operators who may share in the unusable space to the extent that their attachments are not used solely for cable services. Conversely, the current methodology of counting utilities, ILECs, government entities, and other attaching entities denies full cost recovery of the unusable space costs. It allocates costs to ILECs and government entities who are not required by Section 224 to share in the costs, and it allocates costs to utilities who already must pay for one third of the unusable space costs. Utilities and their customers, therefore, unfairly end up at least double-paying costs.

Second, the term "attaching entities" should be interpreted to include only the entities – cable television operators and CLECs -- who are eligible to make "pole attachments" as defined in Section 224(a)(4). This would give meaning to the term "attaching", which immediately precedes and modifies the term "entity". Moreover, this interpretation finds some basis in the text of the statute, unlike the Commission's interpretation. The term "attaching entities" is undefined, and its meaning is unexplained by the legislative history. Finally, as pole attachments effect a *per se* taking of utility property, the statute must be interpreted in order to avoid constitutional questions – particularly with regard to just compensation.[60] Thus, the term "attaching entities" should be interpreted to include cable television operators and CLECs as a matter of statutory construction.

Third, this interpretation is consistent with the rest of the statute. Section 224(e)(2) requires utilities to apportion the unusable space costs among "*entities* . . . so that such apportionment equals two-thirds of the costs . . . that would be allocated to such *entity* under an equal apportionment of such space among all attaching *entities*."[61] It would make sense that the term "entities" would only include cable operators and CLECs, because they are the only entities to whom utilities could apportion the unusable space costs. Similarly, Section 224(e)(3) requires utilities to "apportion the cost of providing usable space among all *entities* according to the percentage of usable

[60] *See Gulf Power v. FCC*, 187 F.3d 1324, 1328-1329 (11th Cir. 2001). *See also Bell Atlantic Telephone Companies v. FCC,* 310, 24 F.3d 1441 (D.C. Cir. 1994), *citing* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982)(statutes should be construed narrowly to avoid a taking of property).

[61] 47 U.S.C. §224(e)(2), emphasis added.

space."[62] Here again, cable operators and CLECs are the only entities that utilities may charge for the usable space under Section 224. Finally, the statute refers to entities in subsections (h) and (i) pertaining to modifications and the costs of rearranging or replacing attachments. Read in combination, they require utilities to provide notice to entities concerning modifications and they require those entities to share in the costs of any modifications to the extent they join in them. This is entirely consistent with interpreting "entities" to include cable television operators and CLECs. Note that when Congress meant to include utilities as an "entity", it did so expressly. Section 224(i) provides that:

> "[a]n entity that obtains an attachment to a pole, conduit, or right- of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (*including the owner of such pole, duct, conduit, or right-of-way*)."[63]

Therefore, the Commission should interpret "attaching entities" to include cable television operators and CLECs, and not to include utilities, government entities, ILECs and other entities that do not attach "pole attachments" as defined by Section 224(a)(4).

3. The Commission should allocate the costs associated with the communications worker safety space among attachers rather than assigning those costs to utilities.

The Commission should also refrain from assigning the costs of the communications worker safety zone to utilities. The communication worker safety zone,

[62] 47 U.S.C. §224(e)(3), emphasis added.

[63] 47 U.S.C. §224(i), *emphasis added*.

as its name indicates, exists for the safety of communications workers who need to access the pole to maintain their communications attachments.[64] It exists because communications workers lack the qualifications to be working in proximity to energized power lines. Thus, it reflects training and equipment costs avoided for attachers, and should be borne by attachers. It should be either treated as usable space occupied by attachers or unusable space whose costs are shared among attaching entities. It should not be treated as usable space occupied by utilities, because such is not the case.[65]

V. Terms and Conditions of Access: Practices by Attachers and Utilities.

The Commission should not impose one-size-fits-all 'best practices" for pole attachments. The Commission deliberately avoided this approach when it decided in 1996 to adopt five rules of general applicability supplemented by guidelines for access.[66] It did so in recognition that "there are simply too many variables to permit any other approach with respect to access to the millions of utility poles and untold miles of

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[64] The National Electric Safety Code (NESC) Handbook states that "[t]he communications worker safety zone is only needed if the communication utility chooses to use communication work rules and equipment."

[65] *But see Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-98 15 FCC Rcd. 6453, 6467 at ¶22 (2000)("Cost Component Order"). The FCC claims that "It is the presence of the potentially hazardous electric lines that makes the safety space necessary and but for the presence of those lines, the space could be used by cable and telecommunications attachers."

[66] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Report and Order*, CC Docket No. 96-98, 11 FCC Rcd. 15499, 16067-16068 at ¶1143 (1996)("*Local Competition Order*")("We conclude that the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis.")

conduit in the nation."[67] It also predicted that mandating access "will likely increase disputes", and it concluded that "rules, guidelines and presumptions… strike the appropriate balance between the need for uniformity, on the one hand, and the need for flexibility, on the other, which should minimize the regulatory burdens and economic impact for both small entities and small incumbent LECs."[68] This has not changed: UTC believes strongly that imposing so-called "best practices" that may benefit attachers, but harm utility workers, would run contrary to the FCC's basic approach, and it would threaten to supersede industry practices as well as Federal/state/local laws and regulations related to pole attachments. UTC urges the Commission to continue to provide flexibility and to allow utilities to accommodate access on a nondiscriminatory, case-by-case basis.

Utilities are increasingly concerned about the impact of pole attachments on utility infrastructure. They are finding a substantial number of unauthorized attachments and code violations on their poles, which create various safety issues with regard to clearances and loading. Illegal pole attachment practices are the direct result of the Commission's pole attachment policies, as applied through various pole attachment complaint proceedings. The Commission has thrown out penalty provisions of pole attachment agreements that would discourage attachers from making unauthorized and non-compliant attachments. It also has permitted overlashing without prior licensing and it has second-guessed utility safety standards that are necessary to protect critical

[67] *Id.* at 16068.

[68] *Id.*

infrastructure.[69] This is contrary to utility pole attachment practices, which generally require prior notice and permitting of attachments, and it is contrary to Section 224(f)(2), which allows utilities to deny access for reasons of insufficient capacity, safety, reliability and generally accepted engineering practices.[70] As the Commission reassesses its pole attachment regulations, it should find ways to protect critical infrastructure rather than to undermine it and cause potential harm to workers in an already-hazardous industry.

A. Best practices are neither best in all circumstances, nor are they necessarily prevailing industry practices.

The "best practices" proposed by Fibertech and supported by others are a contradiction in terms.[71] They are not best in all circumstances, nor are they prevailing industry practices. Instead, to the extent that these practices are permitted at all, they are usually the exception rather than the rule. Moreover, for the safety of critical electric infrastructure, the circumstances under which they are permitted must be determined by utilities. This is consistent with Section 224(f)(2), and it is in the public interest because of the vital need for safe and reliable critical infrastructure.

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[69] See *Arkansas Cable Telecomm's Ass'n v. Entergy Arkansas*, DA 06-494, at ¶ 11 (March 2, 2006) (stating that the Commission has "jurisdiction to review and reject a challenged engineering standard or practice as unjust or unreasonable under section 224, even where the standard or practice complies with state or local requirements."); *See also Cable Television Ass'n of Georgia, et al., v. Georgia Power Co.*, Order, File No. PA 01-002, 18 FCC Rcd. 16333 at ¶ 12 (August 8, 2003).

[70] 47 U.S.C. §224(f)(2).

[71] *See generally,* Petition for Rulemaking of Fibertech, LLC in RM-11303 at 22-24 (filed Dec. 7, 2005).

For example, boxing and extension arms can and have been permitted on an exception basis by some utilities, but these practices are not permitted generally.[72] Boxing poses climbing hazards for utility linemen, because it obstructs both sides of the pole; this is a major issue because utilities depend on linemen to be able to climb poles in order to perform inspections and carry out other pole attachment duties.[73] In addition, boxing makes it more difficult to change out poles because the pole is surrounded by communications lines. The pole may literally need to be lifted out over the lines, rather than simply removed from the side as would normally be the case. Similarly, extension arms pose their own problems with improper construction and clearances. Lines can easily overload extension arms, causing them to break or fall down on people or property. Moreover, the NESC requires communications lines to meet vertical clearances, while extension arms provide only horizontal clearance from other communications lines.

The fact is that, for the safety of their infrastructure, utilities generally require that attachments be licensed, and the permitting process may require field surveys and pre-construction inspections. This can take time.[74] Utilities generally process applications within 45 days, as required by the FCC's rules. However, in addition to surveys and inspections, sometimes there are errors on applications, a large number of poles are

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[72] Boxing refers to the practice of making attachments on both sides of the pole. Extension arms, as the name indicates, are attached to the pole and extend out from the pole to hold lines at the end of the arm.

[73] *See also* Comments of the Public Utility Commission of Oregon in WC Docket No. 07-245 at 5 (filed Mar. 4, 2008)(opposing boxing because of safety concerns about climbing hazards).

[74] UTC Pole Attachment Survey Report, Appendix A at 5, 10-11.

involved or there is a large volume of applications, which may delay processing. These instances represent the minority of cases, and any resulting delays do not appear extensive. In any event, the Commission should not allow attachers to bypass the permitting process on a blanket basis or impose more stringent deadlines for processing applications.[75]

Similarly, the Commission should not impose deadlines for make-ready or require utilities to use alternatives to make-ready on a blanket basis. Most of the time, make-ready is not needed to accommodate an attachment; however, it can be time-consuming when it is required. While many utilities report that they complete make-ready within 60 days or less, approximately 30% of utilities report that this process can take more than 90 days.[76] Make-ready takes time because proper preparation is extremely important to critical infrastructure reliability. For that reason, utilities do not allow attaching entities to hire third parties to conduct engineering surveys and perform make-ready. Because they are responsible to their regulators for the safety of the infrastructure, utilities prefer to maintain control over processes that affect it; no other

[75] *But see* Petition for Rulemaking of Fibertech, LLC in RM-11303 at 22-24 (arguing that the Commission should allow attachers to attach to drop poles without prior notice or prior licensing). *And see Mile Hi Cable Partners v. Public Service Co. of Colorado*, Order, PA 98-003, 15 FCC Rcd. 11450, 11456 at ¶19 (allowing attacher to make pole attachments to drop poles without prior licensing).

[76] UTC Pole Attachment Survey Report, Appendix A at 14-15.

entity has this incentive.[77] As such, deadlines and shortcuts for make-ready are ill-advised and should not be imposed by the Commission.[78]

Finally, the Commission should not impose additional access requirements with regard to conduit and utility records. Such requirements would disclose proprietary and classified information, and place communications workers in hazardous conditions without adequate supervision.[79] Specifically, attachers should not be permitted to search utility records themselves, nor should they be permitted to enter manholes without supervision. Moreover, the Commission should confirm that attachers must reimburse utilities for the costs to retrieve records and supervise manhole entry; both are "but for" costs that are incurred by the utility for the sole benefit of the attacher. In conclusion, all of these "best practices" can and should be addressed on a case-by-case basis under the Commission's authority to review pole attachment complaints – they should not be imposed affirmatively as a rule.

B. The Commission should enforce penalty provisions of pole attachment agreements to discourage unauthorized attachments and to protect critical infrastructure.

The Commission is right to be concerned about "practices of attachers that have the potential to adversely impact the safety and reliability of an integral component of

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[77] *Id.* at 13-14.

[78] *But see* Petition for Rulemaking of Fibertech, LLC in RM-11303 at i, 16-21 (arguing for deadlines for make ready, and asking the FCC to require utilities to allow attachers to hire third parties to conduct engineering surveys and make ready).

[79] Access to utility records could disclose certain "Critical Infrastructure Information" that is protected under federal law. See 6 C.F.R. §29, Pub. L. 107-296, 116 Stat. 2135 (6 U.S.C.§ 1 et seq.). Other state and local restrictions also may apply.

our nation's critical infrastructure, our electric power system."[80] Specifically, there are a significant number of unauthorized attachments and attachments in violation of code. Utilities report on average that they are finding that 11% of all attachments are unauthorized and that 13% are in violation of code.[81] These attachments threaten the safety and reliability of critical infrastructure, and the Commission should do something to stop them. UTC echoes the Chairman's statement that the "safety and reliability of critical electric infrastructure is a paramount concern" and that promoting access and rates for pole attachments should not come at the expense of public safety systems.[82]

Unfortunately, the Commission's policies may have contributed to the prevalence of unauthorized attachments. The Commission has declined to enforce penalty provisions in utility pole attachment agreements. Instead, the Commission has limited recovery to back rent and interest.[83] By limiting recovery to back rent, the Commission negates the deterrent effect of a penalty. Instead, attachers are encouraged to make unauthorized attachments, because it makes economic sense for them to do so. The worst that will happen if they get caught is that they will pay rent

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[80] *NPRM* at ¶38.

[81] UTC Pole Attachment Survey Report, Appendix A at 4, 16.

[82] *NPRM*, 22 FCC Rcd. at 20230, Statement of Chairman Kevin J. Martin.

[83] *Mile Hi Cable Partners v. Public Service Co. of Colorado*, Order, PA 98-003, 15 FCC Rcd. 11450, 11456 at ¶14. Subsequently, the FCC upheld the reduction of the penalty fee, although it concluded that it was unnecessary for the Bureau to have established a rule of general applicability regarding unreasonable attachment fees. *See Mile Hi Cable Partners v. Public Service Co. of Colorado*, Order, PA 98-003, 17 FCC Rcd 6268, 6272 at ¶11. *See also Cable Television Ass'n of Georgia v. Georgia Power Co.*, Order, PA 01-002, 18 FCC Rcd. 16,333 at ¶¶21-22 (2003)(rejecting unauthorized attachment fees that were not cost-based).

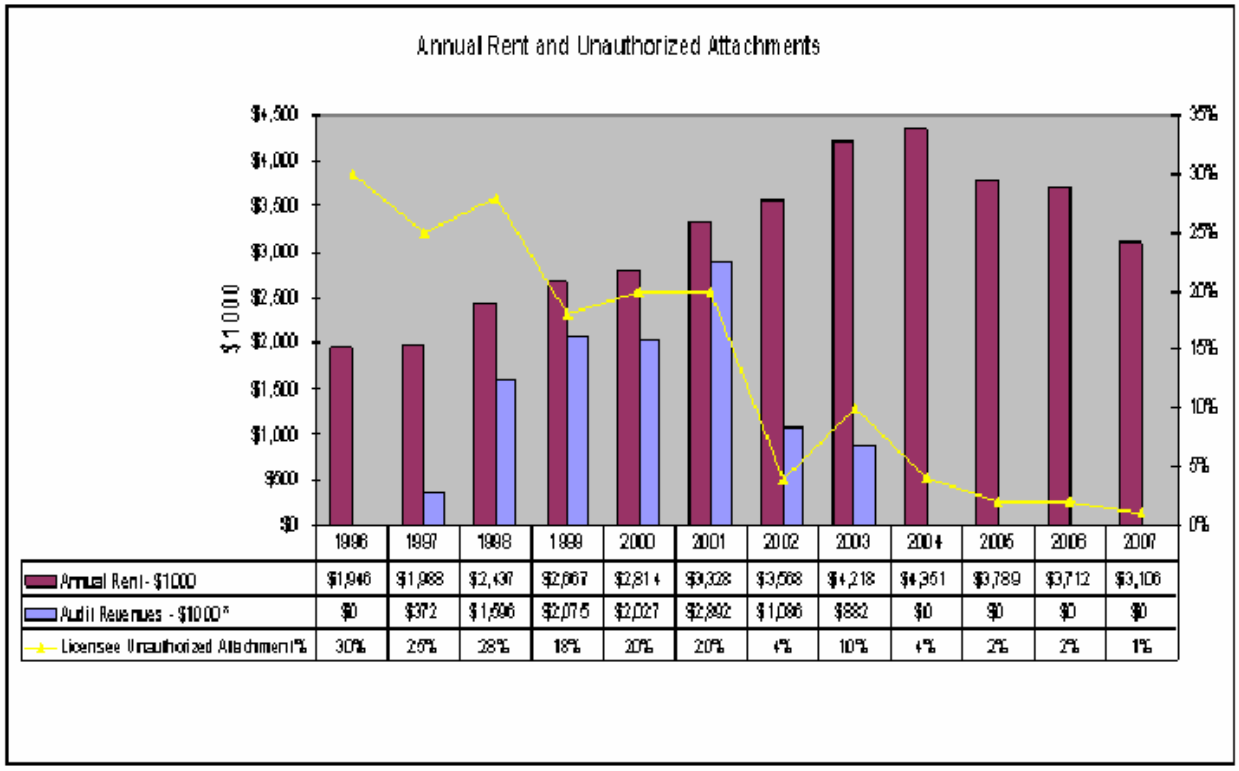
that they would have otherwise paid if they had applied for a license to attach. In the process, they stand to gain because they get immediate access to poles and they avoid any necessary make-ready. In short, it is literally and figuratively a license to steal that also can lead to real dangers to safety.

There is a larger problem here than just penalties; the Commission has declined to enforce the terms and conditions of pole attachment agreements in general, which has led to a "sign-and-sue" approach among attachers. As the Commission acknowledges, the rules encourage attachers to complain immediately rather than to negotiate or mediate with utilities.[84] Attachers have nothing to lose by contesting specific terms and conditions of a pole attachment agreement, and in fact *have never lost a complaint at the Commission*. Each term is reviewed in isolation without regard to the larger context of the overall agreement. As such, attachers are able to unilaterally modify the terms and conditions of pole attachment agreements through the complaint process.

To address the problem of unauthorized attachments and to encourage mutual negotiation and mediation with utilities, the Commission should enforce the terms and conditions of pole attachments. The Commission has stated that penalty provisions are not *per se* unreasonable; now, it needs to actually uphold penalties so that attachers

[84] *NPRM* at fn 110, *citing* 47 C.F.R. §§ 1.1410(c) (the amount of a refund or payment awarded as a remedy for an unlawful rate, term, or condition will "normally" be measured from the date the complaint is filed) *and citing* 47.1.1404(m) potential attachers who are denied access to a pole, duct, or conduit must file a complaint within 30 days of the denial).

take them seriously.[85] The state of Oregon enforces statutory penalties of up to $500/pole for unauthorized attachments; and a utility there reported that those sanctions have brought the rate of unauthorized attachments down to nearly zero from 25% only six years ago when the sanctions went into effect, as shown in the table below.[86]



	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Annual Rent - $1000	$1,946	$1,988	$2,437	$2,867	$2,814	$3,328	$3,568	$4,218	$4,351	$3,789	$3,712	$3,106
Audit Revenues - $1000*	$0	$372	$1,596	$2,075	$2,027	$2,892	$1,086	$882	$0	$0	$0	$0
Licensee Unauthorized Attachment%	30%	25%	28%	18%	20%	20%	4%	10%	4%	2%	2%	1%

Clearly, enforcement of penalties deters unauthorized attachments, if only the Commission would impose them. Moreover, pole attachment penalties are emblematic of the larger need to uphold the terms and conditions of pole attachment agreements generally. Balanced enforcement of the terms and conditions of pole attachment

[85] *Cable Television Ass'n of Georgia v. Georgia Power Co.*, DA-03-2613, Order, 18 FCC Rcd. 16333 at ¶ 22 (stating that penalties for unauthorized attachments are not *per se* unreasonable and that the penalty may exceed the annual rent).

[86] John Sullivan, General Manager, and Karla Wenzel, Contracts Manager and Business Support of Utility Asset Management, Portland General Electric Company, "Case Study: Unauthorized Attachments and Code Compliance" at the UTC 2008 Pole Attachment Meeting, Jan. 14-15, 2008 in Washington, DC.

agreements by the Commission will help to protect critical infrastructure, encourage meaningful negotiation and mediation of contracts, and avoid complaints.

C. Attachers should be required to provide notice and obtain a permit prior to overlashing, and they should be required to timely transfer their attachments within 30 days of the installation of a new pole by a utility.

Another problem with access involves overlashing. The Commission has encouraged overlashing without regard to its impact on critical infrastructure. Specifically, the Commission has allowed overlashing without advance consent of the utility. It only requires notice to the utility if an overlashed attachment changes the applicable rate.[87] Although the Commission permits utilities to require prior notice of overlashing under the terms of their pole attachment agreements, many utilities reported that attachers do not actually notify utilities of overlashing.[88] To be sure, the Commission has stated that third party overlashing is "subject to the same safety, reliability, and engineering constraints that apply to overlashing one's own pole attachment."[89] And many utilities report that they do conduct pre- and post-construction inspection of overlashing when they are notified about it.[90] However, as the Commission does not require advance consent from the utility and attachers rarely provide prior notice, it is difficult for utilities to monitor or control overlashing after the fact.

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[87] The Commission has stated that it would be reasonable for a pole attachment agreement to require notice of third party overlashing generally, but it has not actually required such notice by rule.

[88] UTC Pole Attachment Survey Report, Appendix A at 4, 11.

[89] *Telecom Order,* 13 FCC Rcd. 6777 at ¶68.

[90] UTC Pole Attachment Survey Report, Appendix A at 4, 11-12.

Utilities are concerned that uncontrolled overlashing can overload poles or fail to meet required clearances. Overlashing adds significant weight to each pole, as the table below shows.

Composite Loading from Attachment (Wind Moment + Tension Moment)				
Number of Cables lashed to Messenger	1 Cable	2 Cables	3 Cables	4 Cables
Minimum Loading: 3 degree line angle (% of pole capacity)	8%	11%	13%	16%
Maximum Loading: 10 degree line angle (% of pole capacity)	12%	18%	20%	25%

Overlashing also affects mid-span sag, and in turn, clearance between attachments. The Commission's policies encourage attachers to overlash their attachments multiple times, and attachers are under no obligation to remove overlashed attachments after they are no longer needed or used.[91] As such, overlashing is likely to become a growing problem that will continue to increase load on poles and affect clearances for the forseeable future. Therefore, UTC urges the Commission to affirmatively require attachers to provide advance notice of overlashing and to take enforcement action for failure to provide advance notice.

Attachers also fail to timely transfer their attachments when poles are changed out. This can result in a "double pole" problem in which some attachments remain on one pole while the rest are transferred to another pole right next to it. It can also complicate and delay road widening projects if an attacher fails to timely transfer its attachments. Ultimately, the utility takes the blame for the failure of the attacher. Although some utilities have provisions in their contracts to transfer the attachments

[91] *See Telecom Order,* 13 FCC Rcd. 6777 at ¶62; *See also Cost Component Order*, 15 FCC Rcd. 6453 at ¶29-30 (promoting overlashing as a way to increase access and competition in the marketplace and to use space on the pole efficiently).

themselves and bill the attacher for the work, many utilities do not. Moreover, there are labor and other legal issues that may prevent utilities from transferring attachments themselves. This is a significant problem that state regulators have recognized. To address this problem, UTC urges the Commission to establish a rule that requires attachers to transfer their attachments within 30 days after new poles are installed by the utility.

VI. Conclusion

UTC supports the Commission's initiative to review comprehensively its pole attachment rules in order to promote broadband access and competition and to protect critical infrastructure. UTC supports the concept of a unified rate for broadband pole attachments, and urges the Commission to base the rate level on a revised version of the telecommunications rate. The Commission has the statutory authority to implement a broadband rate, and it would serve the public interest. The rate should only apply to cable television operators and CLECs that are subject to the FCC's pole attachment jurisdiction, not ILECs which are clearly excluded by section 224(a)(5).

UTC opposes one-size-fits all "best practices" for pole attachments, which are contrary to the FCC's fundamental approach to provide flexible guidelines for access. Instead, the FCC should enforce the provisions of pole attachment agreements and support utility safety standards to protect the safety, reliability and integrity of critical infrastructure. It should also implement requirements with regard to overlashing and transfers of pole attachments to ensure compliance with safety and engineering codes and cooperation with pole change outs.

WHEREFORE, the premises considered, UTC supports the Commission's initiative to comprehensively consider its rules for pole attachments by adopting a single rate for broadband attachments and by enforcing penalty provisions and other negotiated terms and conditions of access for pole attachments in order to protect critical infrastructure, as more fully described herein.

Respectfully submitted,

United Telecom Council

s/s
Jill M. Lyon, Vice President & General Counsel
Brett Kilbourne, Director of Regulatory Service & Associate Counsel
Utilities Telecom Council
1901 Pennsylvania Avenue, NW
Fifth Floor
Washington, DC 20006
202-872-0030

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